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Supreme Court of the United States

October Term, 1969.

No. [redacted] 89

ALTON J. LEMON, PRISCILLA REARDON, BETTY J. WORRELL, and PENNSYLVANIA STATE EDUCATION ASSOCIATION, PENNSYLVANIA CONFERENCE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA COUNCIL OF CHURCHES, PENNSYLVANIA JEWISH COMMUNITY RELATIONS CONFERENCE, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, INC.,

Plaintiffs-Appellants,

v.

DAVID H. KURTZMAN, as Superintendent of Public Instruction of the Commonwealth of Pennsylvania, GRACE SLOAN, as State Treasurer of the Commonwealth of Pennsylvania, ST. ANTHONY'S ROMAN CATHOLIC CHURCH SCHOOL, ARCHBISHOP WOODS GIRLS HIGH SCHOOL, UKRAINIAN CATHOLIC SCHOOL, GERMANTOWN LUTHERAN ACADEMY, AKIBA HEBREW ACADEMY, PHILADELPHIA MONTGOMERY CHRISTIAN ACADEMY, and BETH JACOBS SCHOOLS OF PHILADELPHIA,

Defendants-Appellees,

and

PENNSYLVANIA ASSOCIATION OF INDEPENDENT SCHOOLS,

Intervenor Defendant-Appellee,

On Appeal From a District Court of Three Judges for the Eastern District of Pennsylvania.

BRIEF FOR APPELLEE PENNSYLVANIA ASSOCIATION OF INDEPENDENT SCHOOLS.

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STATEMENT OF THE CASE.

Appellants, plaintiffs below, brought an action before a three-judge District Court challenging the constitutionality of the Pennsylvania Nonpublic Elementary and Secondary Education Act (the Act), 24 P. S. § 5601 et seq., which authorizes the Superintendent of Public Instruction to purchase secular educational services in four defined secular subject areas [1] from nonpublic schools,[2] for the benefit of nonpublic school children.

The Preamble, Legislative Findings, and Declaration of Policy in the Act accurately describe the present crisis in elementary and secondary education existing in Pennsylvania and the nation, and the role played by nonpublic schools in alleviating this educational emergency. In response to this crisis and in recognition of the invaluable assistance of the nonpublic schools in furnishing secular instruction to the more than twenty percent of Pennsylvania's youth who attend nonpublic schools (24 P. S. § 5602(2)), the Legislature enacted the statute now before the Court.

Appellees, defendants below, filed a Motion to Dismiss the Complaint. The Pennsylvania Association of Independent Schools, an association of 94 accredited elementary and secondary schools which includes in its membership almost all of the independent schools in the state, moved to intervene as a party defendant. This Motion was granted for purpose of argument on the Motion to Dismiss without prejudice to the Association's application for more general

1. The Act only authorizes such purchase in mathematics, modern foreign languages, physical science, and physical education. 24 P. S. § 5604.

2. Nonpublic schools are defined in the act as ". . . any school, other than a public school within the Commonwealth of Pennsylvania, wherein a resident of the Commonwealth may legally fulfill the compulsory school attendance requirements of law." 24 P. S. § 5603(4).

intervention after disposition of the Motion to Dismiss (A. 53).

After extensive briefing and oral argument, the Court, in an opinion by Troutman, J., joined in by Luongo, J., sustained the Motion to Dismiss. The Court held, *inter alia*, that the organizational plaintiffs lacked standing on all issues in the Complaint, that none of the plaintiffs had standing to challenge the statute under the Equal Protection Clause of the Fourteenth Amendment, and that, on its face, the statute conformed to the commands of the Free Exercise and Establishment Clauses of the First Amendment (A. 100).

Judge Hastie filed a dissenting opinion in which he held that the Motion to Dismiss should be denied as to the Establishment Clause allegations (A. 101-112). However, Judge Hastie concurred in the Court's holding that none of the plaintiffs had the requisite standing to challenge the statute under the Equal Protection Clause and that this portion of the Complaint be dismissed (A. 111).

SUMMARY OF ARGUMENT.

Under any of the stated tests for determining the constitutionality of a state program under the Religion Clauses of the First Amendment, the Pennsylvania Act passes constitutional muster.

In enacting this program into law, the Legislature expressly recognized that a financial crisis now grips elementary and secondary schools. Echoing this Court's findings in *Board of Education v. Allen* (392 U. S. 236 (1968)), that nonpublic schools provide invaluable assistance in educating our youth in secular subjects, the Legislature authorized the state to purchase secular services from nonpublic schools, which presently educate over twenty percent of the Commonwealth's children. Thus, the Act obeys the Constitution's command of governmental neutrality toward religion, since its primary purpose and effect is to further secular education.

By designating a broad and reasonable class of nonpublic schools who may participate in the Act's program, which class includes church and non-church related schools, the state has not used religion as its standard for action. Rather, the state has taken swift and required action to preserve secular educational opportunity and pluralism in our society. Administered within its stated narrow limits, the Act will not lead to governmental establishment of religion.

In the absence of any properly pleaded allegation of fraud by the Legislature in passing the Act, the lower court correctly held that the purpose of the Act was clear on its face, and that the court could not lightly set aside the legislative declarations and findings which clearly support the Act's secular purposes. Further, any doubt as to the constitutionality of the Act should be resolved in favor of its validity, particularly in view of the strong public

interest, as evidenced by extensive state action in this area, to preserve and improve the high quality of private education. This Court should now affirm the lower court's judgment that the Act complies with all First Amendment commands.

As to Fourteenth Amendment claims, the lower court unanimously found that all of the plaintiffs below lacked standing to raise these issues. Plaintiffs below could not point to any interest which would justify their attempts to challenge the Act under the Fourteenth Amendment. This Court should now reaffirm its long standing commitment to the standing doctrine by upholding the judgment of the lower court on this issue.

ARGUMENT.

I. The Meaning of the Establishment Clause.

The principal issue raised by this appeal can be simply stated:

> Does the First Amendment of the U. S. Constitution prohibit a state from using public funds to contract with nonpublic schools for teaching certain designated, secular, non-religious courses to the more than twenty percent of the state's youth who attend nonpublic, independent, or sectarian schools which meet state standards for compulsory education?

We submit that the principles contained in prior First Amendment decisions of this Court, from *Everson v. Board of Education* (330 U. S. 1 (1947)) to *Walz v. Tax Commission of the City of New York*, 397 U. S. 664 (1970), unequivocally support the constitutionality of the Pennsylvania statute. The District Court faithfully heeded the dictates of this Court in upholding the statute's constitutionality and the judgment of the lower court should now be affirmed.

This Court has most recently examined the meaning of the Establishment and Free Exercise Clauses in *Walz v. Tax Commission of the City of New York, supra.* Speaking for the Court, Mr. Chief Justice Burger eloquently described the purposes behind the Religion Clauses of the First Amendment, and the difficult and delicate task faced by the Court in applying these principles:

> The Establishment and Free Exercise Clauses of the First Amendment are not the most precisely drawn portions of the Constitution. The sweep of the absolute prohibitions in the Religion Clauses may have

> been calculated; but the purpose was to state an objective, not to write a statute. * * * 397 U. S. at 668. The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other. 397 U. S. at 668-9.
>
> * * *
>
> The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference. 397 U. S. at 669.

Individual Justices of the Court have given shape to these First Amendment objectives most recently expressed in *Walz* by constructing various tests by which the constitutionality of a statute can be judged. See opinions of the several Justices written in *Everson v. Board of Education*, 320 U. S. 1 (1947); *Abington School District v. Schempp*, 374 U. S. 203 (1963); *Board of Education v. Allen*, 392 U. S. 236 (1968); *Walz v. Tax Commission*, 397 U. S. 664 (1970). Measuring the Pennsylvania Act by any of these standards expressive of First Amendment objectives produces the same, unequivocal result—that the stat-

ute does not violate the principles of constitutional neutrality toward religion embodied in the First Amendment, since it is clear from the face of the Act, that its primary purpose and effect is not to aid religion, but to further secular education.

The National Association of Independent Schools, appearing as an Amicus in this proceeding, has analyzed, in depth, the Pennsylvania Act in light of each of these stated tests and points out that the Act clearly passes constitutional muster by every test advanced by all the Justices of this Court. (See Brief of National Association of Independent Schools.) We wholeheartedly concur in this analysis by the National Association, which is summarized in the sub-paragraphs below:

1. In *Walz* the Chief Justice stated the original purpose of the Religion Clauses: "It is sufficient to note that for the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and a close involvement of the sovereign in religious activity." 397 U. S. at 668. The Act is constitutional under the *Walz* test because it cannot be deemed to constitute sponsorship, financial support and active involvement of the state in religious activity. Benefits under the Act are available to a broad and reasonable category which includes all accredited nonpublic schools in the state, regardless of religious affiliation.

2. The Act will not lead to excessive governmental entanglement with religion. Since the celebrated decision in *Pierce v. Society of Sisters*, 268 U. S. 510 (1925), it has been recognized that the state may not compel children to attend public schools. Children must be allowed to attend nonpublic schools of their

choice, subject to the state's right to impose certain educational standards on these schools.

3. Pursuant to this constitutional doctrine, Pennsylvania has enacted various statutes setting forth mandatory educational requirements. See, e.g., The Public School Code of 1949, as amended, 24 P. S. § 15-1511, § 16-1605. The Pennsylvania Act will not lead to any more significant state involvement in nonpublic educational affairs than already and constitutionally existed before its enactment. (For a detailed analysis of *Pierce* and the constitutionality of state aid to nonpublic schools see, Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 Calif. L. R. 260, 328-9 (1968).)

4. The state may only contract for services in defined secular subject areas so that it will not become entangled in religion, this Court having already recognized that the nonpublic schools perform two separate educational functions—religious and secular. See *Board of Education v. Allen*, 392 U. S. at 247-248.

5. As in *Allen*, the Act has as its primary purpose and primary effect the advancement of the secular education of the state's youth who choose to attend nonpublic schools (See Opinion of the District Court, A. 92-97). In addition, by limiting state participation to four secular subject areas, substantially greater barriers to sectarian involvement are present here than in the *Allen* statute where no such limitations existed.

6. Contrary to Appellants' position, *Allen* does not rest on a requirement that funds be paid directly to the child benefitted by the program in question. The iden-

tity of the payee of the check cannot determine the constitutionality of an Act designed to aid children in obtaining secular education in qualified schools. (See District Court Opinion, A. 97).

7. The Act, limited on its face to contracts for *secular* educational services, does not serve *essentially* religious activities of religious institutions, employ the organs of government for *essentially* religious purposes or use *essentially* religious means to serve governmental ends where secular means would suffice. *Schempp* at 294-5 (Brennan, J., concurring).

8. The secular limitations in the statute also prevent the state from giving support to proselytizing activities of religious sects. (Stewart, J., dissenting in *Schempp*, 374 U. S. at 314.)

9. By designating a broad, reasonable class which encompasses all nonpublic schools, church and non-church related under the Act, the state has not used religion as its standard for action or inaction, and has, thus, obeyed Mr. Justice Harlan's standard of state neutrality to religion. At the same time, by enacting this statute, the State has helped to preserve pluralism, a value highly prized in American society in general, as well as in our educational system in particular. See *Allen*, 392 U. S. at 247-8.

Thus, under any stated test, the Act stays within the constitutionally imposed limits of neutrality toward religion. Administered within its narrow, secular limits, the Act will benefit a broad class of pupils in Pennsylvania and foster continued educational excellence. For these reasons the judgment of the lower court should be affirmed.

II. The Act Promotes the Quality of Secular Education Available to the Youth of Pennsylvania.

In its opinion, the lower court followed the line of Supreme Court cases which declare that legislation enacted to further the education of our children is in the public interest, and that the state may look to nonpublic schools as a proper instrument for effectuating the public's interest in quality education.

> "The education of our nation's children quite properly has been recognized by the Supreme Court as a proper subject of legislation enacted in furtherance of a public interest. *Cochran v. Board of Education*, 281 U. S. 370 (1930). It is neither necessary nor constitutionally permissible to require that educational pursuits be followed only in public institutions of learning; rather, educational goals may effectively be satisfied through private education. *Pierce v. Society of Sisters*, 268 U. S. 510 (1925). As a sensible corollary to the *Pierce* decision and considering the State's interest in satisfying its compulsory education laws through private educational institutions, the *Allen* Court observed:
>
> > [I]f the State must satisfy its interest in secular education through the instrument of private schools it has a proper interest in the manner in which those schools perform their secular educational function. 392 U. S. at 236." (Opinion of the District Court, A. 93.)

The Pennsylvania Act, in its Preamble, Declaration of Policy and Findings, echoes the Court's recognition in *Allen* that we as a nation greatly prize quality education, and that private schools play a significant role in achieving and preserving educational excellence.

The public interest is certainly served by preserving the high quality of private education. The Court in *Allen* made the following observations on these points:

> ". . . private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience. Americans care about the quality of the secular education available to their children.
>
> They have considered high quality education to be an indispensable ingredient for achieving the kind of nation, and the kind of citizenry, that they have desired to create.
>
> Considering this attitude, the continued willingness to rely on private school systems, including parochial systems, strongly suggests that a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students." (392 U. S. at 247-8.)

Lest there by any doubt as to the legitimate public interest in and public purpose of Act 109, see the Legislative Findings and Declaration of Policy of The Act, summarized below:

a. *Financial Crisis*—There is a serious financial crisis in the nation and in Pennsylvania among nonpublic elementary and secondary educational schools.

b. *Relief of Public Burden*—Nonpublic institutions bear the burden of educating twenty percent of our young people—and thereby relieve the taxpayers of a very significant public burden of additional expense.

c. *Secular Public Purpose*—The purpose of the Act is to promote secular education. Nonpublic

schools, through instruction in secular subjects, perform an important public purpose.

1. The Significant and Unique Role of Independent Education.

"I believe that the independent preparatory schools have a significant role in American education. Nothing has helped the independent schools more than the fact they have produced so many national leaders who saw beyond the horizon of their own life. The careers of such men have done more than anything else to make our democracy accept the value of the independent schools."

JOHN F. KENNEDY, *President of the United States of America* in address to Choate School, Wallingford, Connecticut in 1963.

Not only has independent education made a significant contribution to the national interest in contributing vast numbers of well educated, highly motivated leaders in business, the professions and public service,[3] but independent education because of its greater freedom from governmental and bureaucratic controls has been freer to experiment and innovate in new methods and areas of education. Its successes have provided leadership and healthy competition for public education and vice versa. Each in a sense complements the other and gains strength from the interaction between the two.

Independent schools also preserve and further our nation's commitment to a general philosophy of pluralism

3. We would submit that it is not just accident that two of the most imaginative and visionary leaders in government of this century were products of the independent school system—Franklin Delano Roosevelt and John F. Kennedy.

which is essential to the preservation of freedom in a democratic society.

From the early days of the Republic, Americans have formed private associations for myriad purposes. These associations have been the well-springs for creativity in our society and have preserved our commitment to pluralism and equality. Examining this uniquely American phenomenon, Alexis deTocqueville commented on its importance to a democratic society, which still holds true to this day:

> Thus the most democratic country on the face of the earth is that in which men have, in our time, carried to the highest perfection the art of pursuing in common the object of their common desires and have applied this new science to the greatest number of purposes. Is this the result of accident, or is there in reality any necessary connection between the principle of association and that of equality?
>
> Nothing, in my opinion, is more deserving of our attention than the intellectual and moral associations of America. The political and industrial associations of that country strike us forcibly; but the others elude our observation, or if we discover them, we understand them imperfectly because we have hardly ever seen anything of the kind. It must be acknowledged, however, that they are as necessary to the American people as the former, and perhaps more so. In democratic countries the science of association is the mother of science; the progress of all the rest depends upon the progress it has made. DeTocqueville, *Democracy in America,* Henry Reeve text, revised by Francis Bowen.

Independent schools represent one important phase of this American commitment to associations and pluralism,

and their continued existence is vital to the preservation of creativity and freedom in our society.[4]

Thus, even aside from the very substantial additional cost that would result if the burden of nonpublic education were dumped on the taxpayers, the above educational and philosophical considerations alone would more than justify action by the legislature to give financial aid to help forestall the stifling effect that removal of nonpublic education would have on our total educational scheme.

The United States Commissioner of Education, Harold Howe, II, in an address to the National Association of Independent Schools, on March 4, 1967, said:

> "You [independent schools] can experiment with new course offerings that would arouse strong resistance if put forward by the public schools. As an example, I think independent schools have taken a commendable step forward with their decision to introduce major programs of sex education. Your independence, then, gives you the freedom to shape an educational experience which is often superior to that available in many public school systems."[5]

Harold W. Dodds, former President of Princeton University, has made an eloquent statement on the case for independent education.[6] Stressing its primary function as the preservation of freedom, he stated:

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4. See also, "Message From President Nixon on Education Reform to the Congress—March 3, 1970":

> "The nonpublic schools provide a diversity which our educational system would otherwise lack. They also give a spur of competition to the public schools—through which educational innovations come, both systems benefit, and progress results." 91st Congress, 2d Session, House of Representatives Document No. 91-267.

5. The Independent School Bulletin, May, 1967, 14, 15.

6. Speech delivered at Springside School, Philadelphia, on April 2, 1964—reported in *Springside Briefs*, Volume 1, Issue No. 5, page 1.

"Although today the independent schools educate but a small fraction of our youth of pre-college age, my belief that they must survive and prosper roots in a general political philosophy about freedom in general; particularly in what such schools contribute to freedom as well as to education. It is no shock to remind you that the last generation has been featured by a great expansion in the size and scope of government all over the world."

He went on to point out that our freedom in education, as in other areas, depends on a pluralistic society, opposed to an all embracing monolithic structure. Stressing the importance of healthy competition with government, he stated:[7]

"Nothing is clearer to me than the principle, enunciated by Lord Acton, that liberty is possible only in a society in which there are strong voluntary and independent centers of action and opinion outside of government. No matter how honest, well-intended and expert our government official may be, we cannot resign our civic and social responsibilities to any political body or to any autocracy of administrative experts, even experts in education. The notion that they are in a better position than the people generally to make basic public decisions for us, or to administer them

7. John W. Gardner, former Secretary of Health, Education and Welfare has more recently, in a stirring article entitled "What Kind of Society Do We Want?" (*Readers Digest*, Sept. 1969), emphasized the danger of too much reliance on public institutions. Commenting on the qualities a society needs for self-renewal, he states: "First of all, it would be characterized by pluralism, by variety, alternatives, choices and multiple foci of power and initiative." Later, he too stresses the role of education: "The society capable of continuous renewal will be one that develops to the fullest its human resources, that removes obstacles to individual fulfillment, that emphasizes education, life long learning and self discovery."

when made except under popular controls, is an egregious myth."

But as Dr. Dodds points out, to be effective, the competition must excel—and this costs money:

"Most decidedly the case for the independent schools is not to be found simply in the opportunity which they enjoy to be independent; they will be judged in the last analysis by what they do with their independence. They achieve their basic purpose only as they achieve excellence. And excellence in any line, including education, costs money and the money must come from the pocketbooks of individuals who are already paying taxes to support public education."

Dr. Dodds' emphasis on the public interest, which we as a people have in the healthy survival of the independent school as a leader and as a yardstick against which may be measured the quality of public education, is particularly germane:

"Therefore, one chief reason that the independent schools must prosper exists in the freedom they have to concentrate on a mental muscle—stretching education for those able to receive it, to uphold the banner of the well-educated mind in a sound personality and a sound body.

Remember that the independent schools, as they honestly strive for excellence, influence the public school system by inspiring a spirit of emulation, as the private university has inspired the state university, a proposition with which most presidents of state universities will agree.

On the other hand, the public schools, particularly when they are good, afford healthy competition for the independent schools and remind the latter of their constant obligation to serve our democracy well, and not merely a particular segment of our population."

2. The Financial Crisis.

Appellants have charged in their Brief that ". . . few, if any, of the traditional, high tuition, exclusive private academies are in any sense in need of state subsidy in order to continue teaching, and teaching very well, mathematics, foreign languages, physical sciences and physical education (Appellants' Brief, p. 35). In an attempt to support this charge, Appellants have gone outside of the record to introduce unsworn to allegations about the endowment and physical facilities of one independent school which is receiving payments under the Act (See n. 11 at p. 34 of Appellants' Brief).

Even though such statements are based on allegations not of record and even though Appellants have flagrantly violated Rules of this Court in introducing such irrelevant material (See Rule 40(5)), PAIS cannot permit Appellants the luxury of making such false and unfounded statements.

One school out of hundreds of independent schools in the state may have a sizeable endowment but such a situation is the exception, not the rule. It is a matter of common knowledge of which this Court may take judicial notice that independent schools are now facing a grave economic crisis which is exacerbated by current inflationary trends in the nation's economy. Without some form of state assistance, independent schools, faced with spiralling costs, would be forced to boost tuitions to such a level that would inevitably price these schools into practical extinction.[8] In order to preserve its scholarship programs and its general philosophy of serving a wide social and economic cross-section of the community, the independent school must be

8. "In the past two years, close to a thousand nonpublic elementary and secondary schools closed and most of their displaced students enrolled in local public schools." Message of the President on Education Reform, *supra*.

offered the opportunity to participate in programs such as the one now before this Court.

Theodore R. Sizer, Dean of The Harvard Graduate School of Education has stressed the acute financial crisis facing nonpublic schools and the risk spiraling costs could have on scholarship aid to provide a varied student body. He said:[9]

> "How to finance this necessary and responsible increased cost? In my judgment the average independent school will not be able to increase its income the requisite amount and still hold tuition down low enough to provide for a varied student body. The only recourse is public funds, and I am prepared to argue that support of private education is in the public interest. Public education needs competition the pace setting and goading which strong independent schools might provide."[10]

Speaking on the importance of public funds to aid private education, United States Commissioner of Education Harold Howe said on the same date:

> "We will see more, rather than less, Federal aid to education in the years ahead for two reasons:
>
> First, the Congress knows that State and local funds alone cannot buy the kind of education we need to prepare students for a technological society and for a world beyond our shores that is infinitely more complex today than it was two decades ago.
>
> Second, a genuinely democratic society cannot tolerate the inequable distribution of quality that characterizes our State education system."[11]

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9. Address before the Teacher Training Section of the National Association of Independent Schools, March 4, 1967.

10. Independent School Bulletin, May 1967, 19, 21.

11. Independent School Bulletin, May 1967 at 17.

3. Relief of Public Burden.

That nonpublic education relieves the taxpayer of a very substantial financial burden, is a fact not subject to question. It takes few calculations to demonstrate the tremendous financial burden, both as to annual operating expenses and capital expenditures for physical plant, that would be thrust on the taxpayers if it were not for the nonpublic schools.

Thus it has been estimated that out of the total annual expenditure of $1,629 billion dollars by the Commonwealth and nonpublic schools for all elementary and secondary education in 1967, $400 million represented the value of the contribution for nonpublic education.[12]

Estimates on the capital costs of building new facilities to accommodate the additional pupils now in nonpublic schools could run as high as $1.2 billion.[13]

In light of such overwhelming judicial authority, cumulative findings, and strong pronouncements of prominent leaders and educators, we wonder how anyone could seriously challenge the unassailable proposition that there is a public purpose served when the state seeks to support qualified nonpublic educational institutions with state funds.

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12. This figure was determined by multiplying the estimated cost per pupil ($637) by the number of students (627,000).

Source: *Statistics of Public, Elementary and Secondary Schools —U. S. Department of Health, Education and Welfare, Fall, 1967.* Table 12, p. 26; and see *"Public School Financial Statistics Report* 1967-68" Vol. 8, No. 7, 1969, p. 2.

13. This additional capital cost is computed by multiplying the estimated capital cost per student ($2,000) by the number of students (627,000).

Source: "An appraisal of the Pennsylvania School Subsidy System" (prepared for the Superintendent of Pa. Dept. of Public Instruction by the State Division of the Pa. Economy League, Inc., July 1968, p. 6).

III. The Lower Court Did Not Err in Holding That the Primary Purpose and Effect of the Act Does Not Aid or Inhibit Religion.

In ruling on the Motion to Dismiss, the lower court accepted as true all the well-pleaded allegations of fact in the Complaint. However, the court quite properly did not accept as a fact plaintiffs' self-serving statement that the primary purpose and effect of the Act was to aid religion. Rather, the court followed the well-established rule that legal conclusions drawn from pleaded facts are not deemed admitted on a Motion to Dismiss. *Newport News Co. v. Schauffler*, 303 U. S. 54, 57 (1938) (A. 88).

The court below went on to hold that the purpose of the Act was clear on its face—to promote the welfare of the people of the Commonwealth and promote the secular education of children attending nonpublic schools, as stated in the Legislative Declaration of Policy and as supported by the Legislative Findings (A. 91-92). The court also held that within the narrow confines of the Act, ". . . neither the primary nor the necessary operative effect of the statute advances religion." (A. 95).

Appellants now argue that the lower court erred by not considering the legislative history of the Act in assessing its constitutionality. They contend that the Legislature's Findings and Declaration of Policy are so much "window dressing"—and that the Legislature had attempted to deceive the public—because its real purpose was, in effect, to aid the Catholic Church and its educational program (Appellants' Brief, 24-25). This is tantamount to a charge of fraud by the legislature, although plaintiffs' complaint is devoid of any allegations or specific charges of fraud and deception. Thus, Appellants urge this Court to ignore the findings of the trial court, to pierce the alleged veil of deception, and thereby unmask the Legislature's unconstitutional purpose for enacting the Act.

However, Appellants' argument runs afoul of basic rules of federal pleading and the policy enunciated by this Court that legislative findings are not to be lightly set aside on the assumption that a wrongful purpose or motive caused the Legislature to act. *McCray v. U. S.*, 195 U. S. 27, 56 (1904); *McGowan v. Maryland*, 366 U. S. at 469 (Frankfurter, J.); *U. S. v. O'Brien*, 391 U. S. 367 (1968).

Furthermore, Federal Rules of Civil Procedure 9(b) provides that fraud must be pleaded with clarity and great particularity:

> "(b) *Fraud, Mistake, Condition of the Mind.* In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally."

Appellants in their Brief have, in effect, charged the Pennsylvania Legislature with fraud, but such allegations, or the specificity required under FRCP 9(b), are conspicuously absent from the Appellants' Complaint. Absent such allegations the lower court, on a motion to dismiss, had no basis or reason to doubt the sincerity and propriety of the legislative findings and declarations which declare and support the secular purpose of the Pennsylvania Act.

Under such circumstances, the lower court correctly heeded this Court's admonitions against attributing Machiavellian motives and purposes to a legislature which has made findings and declarations that support the statute's constitutional purpose.

In *U. S. v. O'Brien*, the Court reaffirmed this fundamental policy which embodies the sound philosophy of judicial restraint in evaluating the constitutionality of legislative actions. When the meaning of a statute is ambiguous, the Court in *O'Brien* said that the trial court should look to

legislative history to ascertain the legislature's intent. 391 U. S. at 383-4. However, no party to this action has ever contended that Act 109 is ambiguous. In all other cases, the Court should not question the declared constitutional purpose of a statute, unless it is clear that its *inevitable* effect contravenes the Constitution. 391 U. S. at 384-5.

The Court in *O'Brien* cited two previous cases where the Court properly pierced a veil of legitimacy surrounding a statute because the statute would lead to an inevitable unconstitutional result. In *Grosjean v. American Press Co.*, 297 U. S. 233 (1935) and *Gomillion v. Lightfoot*, 364 U. S. 339 (1969), a cursory examination of the statutes in question revealed that both statutes under attack would inexorably deprive individuals of Constitutional rights. In *Grosjean*, a tax on periodicals based upon circulation could have no other effect than casting a chilling shadow on free speech. The gerrymander statute under attack in *Gomillion* had the inevitable effect of disenfranchising one identifiable group—blacks living in one section of Tuskegee, Alabama. Thus, the Court in analyzing *Grosjean* and *Gomillion* declared:

> "These cases stand, not for the proposition that legislative motive is a proper basis for declaring a statute unconstitutional, but that the inevitable effect of a statute on its face may render it unconstitutional." 391 U. S. at 394.

However, in this action, as in *O'Brien*, the statute under consideration does not have one inevitable, unconstitutional effect. The Act offers benefits to a wide class of schools that embraces sectarian and non-sectarian schools alike. If the New Jersey statute in *Everson* is constitutional, surely this open-ended statute, which is founded on sincere and honest legislative findings, is also worthy of constitutional protection.

A close reading of this Court's opinion in *Allen* should dispel any remaining doubt that the lower court was correct in refusing to overturn the Legislature's findings. The legislative findings and declaration made in support of the New York book statute were accepted as true expressions of legislative purpose by the lower court as well as by this Court:

> "The express purpose of Section 701 was stated by the New York Legislature to be furtherance of the educational opportunities available to the young. Appellants have shown us nothing about the necessary effects of the statute that is contrary to its stated purpose." 392 U. S. at 243.

Appellants, however, ignore these principles that support the lower court's judgment and instead argue that validation of the Pennsylvania Act will automatically place the imprimatur of constitutionality on efforts of former de jure segregation states to support private, segregated academies with an eye to circumventing desegregation orders (Appellants' Brief p. 28). Such an inflammatory argument simply falls apart upon analysis of the factors in this case:

First, Plaintiffs challenging a statute always have it within their power to allege legislative fraud or a devious scheme to evade Constitutional mandates with clarity and particularity as required by rules of pleading. Plaintiffs in this case failed to avail themselves of this right.

Secondly, courts have the power to invalidate statutes whose inevitable effect is to violate the Constitution, *U. S. v. O'Brien, supra*. The fact that the statute in this case does not fall within this standard does not in any way impair the strength of that Constitutional command.

Thirdly, this Court has consistently taken the position that states which formerly followed a policy of state-required and state-enforced segregation in schools are under an affirmative duty to dismantle that system and desegregate their schools. *Brown v. Board of Education*, 347 U. S. 483 (1954); *Brown v. Board of Education*, 349 U. S. 294 (1955); *Cooper v. Aaron*, 358 U. S. 1 (1958); *Griffin v. County School Board*, 377 U. S. 218 (1964); *Green v. County School Board*, 391 U. S. 430 (1968); *Alexander v. Holmes*, 396 U. S. 19 (1969). In evaluating every desegregation plan, the courts must analyze it against the state's past history of required segregation. *Green v. County School Board*, 391 U. S. at p. 437-438. This Court has already invalidated ingenious efforts by de jure states to emasculate desegregation orders by financing "private" all-white schools (*Griffin v. County School Board, supra.*), and we have no doubt that the *Griffin* result would not be effected by clever alterations in the unconstitutional scheme.

Finally, an aggrieved individual who has been discriminated against always has it within his power to bring a specific action against the school or schools who are guilty of such unlawful practices. Furthermore, the Internal Revenue Service recently announced that private schools which follow racially discriminatory admissions policies will no longer be granted tax exempt status, and that contributions to such schools will no longer be tax deductible. 1970 P. H. Fed. ¶ 21,016 (News Release 7-10-70), Prentice-Hall Federal Taxes Report Bulletin, Vol. LI, No. 29, ¶ 55,209.

By contrast, Pennsylvania's history is not stained by the shameful mark of state-required segregation. Private schools in Pennsylvania were not formed in order to keep the races separated by walls of discrimination and prejudice. The independent schools in Pennsylvania are not, contrary to Appellants' unfounded charges, segregated in-

stitutions. Rather, as more fully discussed in Section V. of the Brief, they serve a wide spectrum of individuals in the community, including an ever-increasing number of black students. Based on such well-known facts, Appellants cannot say that the approval of the Pennsylvania Act lends constitutional support to efforts of formerly segregated states to evade their duty to dismantle long-standing segregation systems.

IV. Any Doubt as to the Constitutionality of the Pennsylvania Act Should Be Resolved in Favor of Its Validity.

Any doubt as to the constitutionality of the Pennsylvania Act should be resolved in favor of its validity, particularly in view of the strong public interest, as evidenced by extensive state action in this area, to preserve and improve the high quality of private education.

This Court has on many occasions held that its power to declare state programs unconstitutional should be sparingly exercised. *Walters v. City of New York,* 347 U. S. 231 (1954); *New York v. O'Neill,* 359 U. S. 1 (1959). Judicial interference with legislative action on grounds of unconstitutionality should be exercised with great care and only in compelling circumstances. *Walters v. City of New York, supra.*

Thus, any doubt as to the constitutionality of the Act should be resolved in favor of permitting the state to aid nonpublic education; and this is particularly so in light of the ever-increasing concern and demand at both national and state levels for high quality nonpublic education.

On the national level see, for example, the following excerpts from President Nixon's Message to Congress, charging the Commission to Study Education Reform (see copy attached as Exhibit A to this Brief):

> Should any single school system—public or private—ever acquire a complete monopoly over the education of our children, the absence of competition would neither be good for that school system nor good for the country. * * *
>
> *If most or all private schools were to close or turn public, the added burden on public funds by the end of the 1970's would exceed $4 billion per year in operations, with an estimated $5 billion more needed for facilities.*
>
> * * *
>
> In its deliberations, I urge the commission to keep two considerations in mind. First, our purpose here is not to aid religion in particular but to promote diversity in education; second, that nonpublic schools in America are closing at the rate of one a day. (Emphasis original.)
>
> 91st Congress, 2d Session, House of Representatives, Document No. 91-267 (March 3, 1970).

At the state level, there has been even greater activity in response to the widespread public demand for the kind of high-quality private education referred to by Mr. Justice White in the *Allen* majority opinion. (See statement from 392 U. S. at 247-8 quoted in this Brief at page 11). A statistical summary, attached as Exhibit B to this Brief, indicates that, to date, some thirty-one states have either enacted, or have under serious consideration, legislation to provide various forms of aid to nonpuplic education, thus demonstrating the strong determination of the states to develop innovative and constitutionally permissible programs to aid secular education through private institutions.

Such experimentation by the various states is a direct by-product of our nation's federalist system in which the

states serve as laboratories for creative change. As long as there is no curtailment of religious liberty, the First Amendment, as applied to the states by the Fourteenth, should not be interpreted so as to restrict the freedom of the states to respond creatively to the ever-changing problems of their peoples. As developed in Section II of the Amicus Brief of the National Association for Independent Schools, the states should have greater freedom to aid even religious institutions, in ways that might be foreclosed to the Federal Government since restrictions under the First Amendment are made applicable to the states only by virtue of the Fourteenth Amendment. As Mr. Justice Harlan, concurring in *Walz* stated:

> It may also be that the states, while bound to observe strict neutrality, should be freer to experiment with involvement—on a neutral basis—than the Federal Government. 397 U. S. at 699.

In light of this valid distinction between the powers of Congress and the states to develop programs that must meet First Amendment commands of neutrality, it is clear that in a case such as this, one seeking to set aside the action of a state legislature has an even heavier burden than in the case of an Act of Congress.

Clearly, Appellants have not met this burden and their appeal should now be dismissed.

V. The Lower Court Was Correct in Finding That All Plaintiffs Lacked Standing to Raise Claims Under the Equal Protection Clause.

The court below unanimously found that all plaintiffs lacked standing to challenge the Act under the Equal Protection Clause (A. 86-87; A. 111).

As to the organizational plaintiffs, it is clear that the complaint fails to establish the requisite personal stake in the outcome of the controversy to confer standing upon these groups as required by *Flast v. Cohen*, 392 U. S. 83 (1968). The organizational plaintiffs are not alleged to be taxpayers generally or specifically under the statute, nor is it alleged that they are suing on behalf of their members who may be taxpayers. Clearly, such organizations cannot meet the standing requirements of the federal courts to press any claims in this action.

As to the individual plaintiffs, they have all failed to establish even a prima facie logical connection between their status as taxpayers and the statute attacked and the type of alleged constitutional infringement, as is required to meet standing requirements, 392 U. S. at 102-3. Two of the plaintiffs failed to allege that they even paid the tax imposed by the statute in question (A. 86), so that they are not even within the class of affected taxpayers. Nor have these two plaintiffs pointed to any other interest to confer standing on them (A. 87).

Plaintiff Lemon, who did pay the tax in question, (A. 57), attempts to establish his standing by alleging that he is a Negro and a parent of a child who attends a Pennsylvania public school (See ¶ 6 of Complaint, A. 10). However, several vital links are missing from his pro-offered standing chain. Lemon fails to allege that he is suing on behalf of his child, or other similarly situated children, so that he is incapable of pressing their alleged claims in this action. Secondly, even if Lemon could raise his child's claims, he fails to allege that he or his child have been discriminated against by the state or any schools who contract with the state pursuant to the statute. Lemon raises no claim that his child's school is now, as a result of the statute, segregated or in danger of becoming segre-

gated. Under such circumstances, the wise policy of standing forbids the federal courts from resolving these claims because:

> "The absence of an allegation that the personal rights of these parties are affected has the net effect of seeking to raise hypothetical grievances of others who *may be* personally injured by such discrimination. Standing requires at least that the plaintiff himself be personally affected. *Flast*, supra, at 110. See also *United Public Workers v. Mitchell*, 330 U. S. 75 (1947)." (Opinion of the District Court, A. 87)

However, even if plaintiffs were allowed to litigate their claims of equal protection violations, they could not make out a case under the Equal Protection Clause. In their Brief to this Court, Plaintiffs have made certain charges devoid of any factual support in the record against the non-church related schools, under the self-serving heading "The Known Facts with Respect to Racial Discrimination." (Appellants' Brief, p. 49). Speaking for its member schools, PAIS asserts that such "facts" are completely unfair, unjustified and untrue. PAIS would be the first to admit that its members' student bodies are not 50% black and 50% white. However, PAIS categorically denies that its member schools discriminate against black students or that its member schools are segregated. As stated in the Petition of PAIS to intervene as a party in the action before the lower court, all member schools admit all qualified students without regard to race, creed or color (A. 43). It denies that these schools have only admitted a few "token (middle class) black children." (See Appellants' Brief, pp. 48-50 where these charges are made.) PAIS resists and resents plaintiffs' unfounded and unsupported charges that its members have only begrudgingly opened the door

just a crack to admit a mere handful of carefully screened black students. This is just not an issue in the case and we are confident that the Court will totally disregard Appellants' manifestly improper and unfair charges.

Should there ever come a time when the issue of discrimination is properly raised, our member schools are prepared to establish and prove the great progress made in increasing their black enrollment through various recruitment and scholarship programs. Independent schools must charge ever-increasing tuitions to meet the ever increasing costs of providing a quality education to their students. Unfortunately, economic discrimination prevents many black parents from sending their children to the independent schools. But, PAIS member institutions are fighting this harsh fact by offering increasing amounts of scholarship aid to interested black applicants.

Without some state support as provided by the Pennsylvania Act, the independent schools would be hard pressed to continue these essential programs. Instead, independent schools would be forced by economic reality to educate only those children whose parents can meet the costs of independent education. Such a result would not only deprive many black students of an educational alternative to the public school system, but it would also frustrate the goal of independent schools to bring together and to educate a broad spectrum of individuals in the community, and not just those who can afford private schooling.

Because PAIS member schools are fighting to further greater diversity among their student bodies, we cannot and have not allowed Appellants' unfounded charges of discrimination to go unchallenged. Even though Appellants lacked standing to raise any of the asserted Fourteenth Amendment claims, PAIS felt duty bound to present the actual facts to this Court, which belie Appellants' irre-

sponsible charges that the independent schools in Pennsylvania discriminate against blacks. Such an accusation is false, and no amount of discovery or testimony at trial could substantiate that groundless charge.

CONCLUSION.

For the reasons stated in this Brief, the Amicus Brief of the National Association of Independent Schools, and the Brief of the Defendants-Appellees, this Court should affirm, in its entirety, the judgment of the lower court.

Respectfully submitted,

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August, 1970.

Appendix.

EXHIBIT A

Message From the President of the United States on Education Reform to the Congress of the United States March 3, 1970.*

* * *

(*f*) *Non-Public Schools.*—The non-public elementary and secondary schools in the United States have long been an integral part of the nation's educational establishment—supplementing in an important way the main task of our public school system. The nonpublic schools provide a diversity which our educational system would otherwise lack. They also give a spur of competition to the public schools—through which educational innovations come, both systems benefit, and progress results.

Should any single school system—public or private—ever acquire a complete monopoly over the education of our children, the absence of competition would neither be good for that school system nor good for the country. The non-public schools also give parents the opportunity to send their children to a school of their own choice, and of their own religious denomination. They offer a wide range of possibilities for education experimentation and special opportunities for minorities, especially Spanish-speaking Americans and black Americans.

Up to now, we have failed to consider the consequences of declining enrollments in *private* elementary and sec-

* 91st Congress, 2d Session, House of Representatives, Document No. 91-267.

ondary schools, most of them church supported, which educate 11% of all pupils—close to six million school children. In the past two years, close to a thousand nonpublic elementary and secondary schools closed and most of their displaced students enrolled in local public schools.

If most or all private schools were to close or turn public, the added burden on public funds by the end of the 1970s would exceed $4 billion per year in operations, with an estimated $5 billion more needed for facilities.

There is another equally important consideration: these schools—non-sectarian, Catholic, Protestant, Jewish and other—often add a dimension of spiritual value giving children a moral code by which to live. This government cannot be indifferent to the potential collapse of such schools.

The specific problem of parochial schools is to be a particular assignment of the Commission.

In its deliberations, I urge the commission to keep two considerations in mind. First, our purpose here is not to aid religion in particular but to promote diversity in education; second, that nonpublic schools in America are closing at the rate of one a day.

(p. 9)

* * *

EXHIBIT B

STATE PROGRAMS FOR ASSISTANCE TO NONPUBLIC SCHOOLS — 1970 [1]

	Purchase of Services		Textbook Aid		Tax Credits		Tuition Grants		Health & Welfare Services		Busing	
	Enacted	Proposed *	Enacted	Proposed *	Enacted	Proposed *	Enacted	Proposed *	Enacted	Proposed *	Enacted	Proposed *
Alaska	X											
Arizona								X				
Calif.								X				
Colorado				X								
Conn.	X		X						X		X	
Delaware											X	
Florida		X		X								X
Hawaii					X							
Illinois		X										
Indiana											X	
Kansas											X	
Louisiana		X	X									
Maine		X		X								
Maryland		X		X							X	
Mass.		X		X								
Michigan	X										X	
Minnesota		X						X			X	
Mississippi			X									
Montana		[2]						X				
Nebraska										X		
N. Hampshire		X	—					X			X	
New Jersey								X			X	
New Mexico			X						X		X	
New York		X		X					X		X	
N. Dakota									X		X	
Ohio [3]		X							X		X	
Penn.	X											
Rhode Island	X		X			X		X				
Vermont							X					
W. Va.		X									X	
Wisconsin								X			X	

* As used in this table, a proposed plan indicates a plan which has been introduced in the legislature or advocated by a responsible governmental authority.

[1] Based on a report by the National Catholic Educational Association, "Survey of Programs and Plans for State Assistance to Nonpublic Schools—Elementary & Secondary as of March 1, 1970."

[2] Proposal for state to hire lay teachers to teach secular courses in nonpublic schools.

[3] Ohio currently has a teacher salary supplement program which provides for the teaching of secular courses.